No. 87-1661

In The
Supreme Court of the United States

October Term, 1988

ASARCO, INCORPORATED, *et al.*,
Petitioners,

v.

FRANK AND LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court Of the State of Arizona

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Arizona Enabling Act and Constitution establish an express trust over Arizona's federally granted school lands and their products, and further specifically prohibit the leasing of such lands for less than their true value as established by appraisal. Only oil and gas leases are excepted from the prior appraisal requirement: Mineral leases, specifically authorized in the Act and Constitution, are not so excepted. Despite these provisions, the State of Arizona has for years leased school trust mineral lands under a statute that actually prohibits prior appraisal and imposes one inflexible royalty rate on the net value of all minerals extracted — a formula that in some cases mandates the outright giveaway of school trust mineral resources. The question presented is whether the Arizona Supreme Court correctly held this statute to be violative of the appraisal and true value requirements as well as the state's fiduciary duty to maximize revenues for the benefit of the public schools.

LISTINGS REQUIRED BY RULE 28.1

The listings for respondents required by Rule 28.1 of the rules of this Court are at page ii of Respondents' Brief in Opposition, filed on May 24, 1988.

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BRIEF FOR RESPONDENTS

STATEMENT

Introduction. The Arizona Enabling Act and Constitution establish an express trust over Arizona's granted school lands and their products and further specifically prohibit the leasing of such lands for less than their true value as established by appraisal. Only oil and gas leases are expressly excepted from the prior appraisal requirement: Mineral leases, specifically authorized in the Act, are not so excepted. Relying on these provisions, the Arizona Supreme Court struck down as violative of the Act and Constitution an Ari-

zona statute that sets a maximum price for all minerals sold from trust lands, that bars the state land commissioner from requiring payment of the appraised, true value for mineral leases, and that in some cases mandates the outright giveaway of trust mineral assets. Although Arizona no longer defends this statute, the petitioners (hereinafter "the mines") urge this Court to reverse the court below on the theory that minerals are totally exempt from the Act's trust restrictions. The Arizona Supreme Court considered and rejected this claim, finding that Congress intended Arizona's school children to enjoy the full benefit of these trust assets.

The School Land Grant in Arizona. Pursuant to the Enabling Act, the United States granted four sections of land in each township to Arizona, collectively totaling almost ten million acres. [1] The Act declared that "all lands" thereby granted, as well as all "natural products and money proceeds" of such lands "shall be by the said state held in trust" to be disposed of only in accordance with the Act's specific directives. The Act prohibited the disposal of any trust lands or products thereof for less than "true value" as established by prior appraisal, and required competitive bidding as publicized by prior advertisement. *Id.* The Act further provided that "[d]isposition of any said lands, or of any money or thing of value directly or indirectly derived therefrom" in any manner contrary to the provisions of the Act "shall be deemed a breach of trust." Act §28. [2]

These restrictions reflected "Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." *Lassen v. Arizona*, 385 U.S. 458, 467 (1967).

[1] New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557 (hereinafter the "Act"). *See* Pet. 4a-5a.

[2] The original Enabling Act also contained a general prohibition on the mortgage or other encumbrance of the school trust lands. An exception was provided, however, for leases for a term of five years or less. Such leases were allowed without having to comply with the advertisement requirement that would otherwise be applicable. Act §28, 36 Stat. at 574.

Prior to Arizona's admission, a number of states had squandered and dissipated their school trust resources, sometimes by private sales at unreasonably low prices. *Id.* at 464; *Murphy v. State*, 65 Ariz. 338, 351, 181 P.2d 336, 344 (1947). Because of such past abuses, Congress was determined to ensure that Arizona's trust would not "be exploited for private advantage." *Lassen*, 385 U.S. at 464. Accordingly, the restrictions inserted into the Act on disposition of trust assets were much more stringent than those in earlier enabling acts. *See Id.* at 467-68.

The original Enabling Act excluded from the school land grants any sections known to be mineral in character at the time of survey. [3] Despite this reservation, minerals were sometimes discovered after title vested in the state. As long as the presence of these "after discovered" minerals was not known at the time of survey, the land and the minerals were treated as having passed to the school trust along with the rest of the grant. *See Shaw v. Kellogg*, 170 U.S. 312, 332-33 (1898). However, the question of whether any particular section was "known" mineral at survey could always be contested: there was no statute of limitations, at least insofar as claims by the United States for recovery of such lands. Thus, the state's title to virtually every school section was subject to challenge at any time on the ground that it had in fact been known mineral in character at survey.

To remove this title cloud and effectuate the purpose of the original grants, Congress passed the Jones Act of 1927, described in its title as: "An Act Confirming in States and Territories title to lands granted by the United States in aid of common or public schools." By its terms, the Jones Act "extended" the grants to the states of numbered school sec-

[3] The state's title to school sections did not vest until completion of an official survey, which sometimes did not occur until years after statehood. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 502-03, 507 n.8 (1980). As used herein, the time of "survey" means the date of statehood as to sections already surveyed by then, and the date of actual survey as to other sections.

tions "to embrace numbered school sections mineral in character." This grant of mineral sections was to "be of the same effect as prior grants for the numbered non-mineral sections." As an additional protective measure, the statute prohibited the states from selling their mineral rights outright, allowing them only to be leased. As with the original grants, the proceeds from such leases were earmarked for the public schools. Jones Act of 1927, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. §870).

In 1936 Congress amended the Arizona Enabling Act to extend the permissible duration of school trust mineral leases beyond the five year limit in the original act. The amendment specifically authorized leases for "mineral purposes (including leases for exploration of oil and gas and extraction thereof)" for up to twenty years. In addition, the amendment deleted the Enabling Act's original exemption of these leases from the requirement of public advertisement. Act of June 5, 1936, ch. 517, 49 Stat. 1477.

The most recent amendment to the Arizona Enabling Act came in 1951. At that time, Congress specifically exempted oil and gas leases, which had previously been treated as a category of mineral leases, from the Act's appraisal, bidding and advertising requirements. No such exemption was provided for other kinds of mineral leases. Act of June 2, 1951, ch. 120, 65 Stat. 51. Although the original version of the amendment would have exempted other kinds of mineral leases from the advertisement requirement, even that exemption was deleted by the Senate committee. S. Rep. No. 194, 82d Cong., 1st Sess. 2, 5 (1951).

Operation and Effect of the Mineral Royalty Statute. As of 1983, a total of 145 lessees held 681 state-issued mineral leases on Arizona's school trust lands. R. 31.[4] At least 28 different minerals are encompassed by these leases, including

[4] 'R' references are to document item numbers in the Maricopa County Superior Court docket index. J.A.1. 'SR" references are to document item numbers in the Arizona Supreme Court docket index. J.A.13.

not only metalliferous materials such as copper, molybdenum, uranium, gold, and silver, but also nonmetalliferous materials such as clay, sandstone, gypsum, and marble. *Id.* Leaseholds are located throughout the state, and range from small gemstone claims worked by individuals to multimillion dollar open pit mines operated by major corporations. *Id.*

The Arizona State Land Commissioner is charged with the responsibility of managing all of the state's school trust lands. Ariz. Rev. Stat. Ann. §§37-101, -131. Under Arizona's first mineral leasing statute adopted in 1915, the Commissioner had authority to negotiate the terms of mineral sales on a case-by-case basis: There was no maximum royalty rate and the Commissioner was free to require payment of true value for each claim. 1915 Ariz. Sess. Laws 13, 27-28 (2d Sp. Sess.), codified in 1928 Rev. Code Ariz. §2973. In 1941, however, the state legislature adopted Arizona's current mineral royalty statute, setting a fixed formula that must be followed by the Commissioner in administering all trust mineral leases. Under this statute the royalty for extraction of minerals from school lands must in every case be 5% of the net value of minerals produced. Ariz. Rev. Stat. Ann. §27-234.B. The Commissioner must charge precisely the same rate for copper, gold, and uranium as he charges for clay, lead and sandstone, and he is precluded from appraising each leasehold to determine its true value prior to leasing. The fixed, 5% royalty payment constitutes the entire price paid by the lessee for the minerals, aside from a $15 per lease annual rental payment. Ariz. Rev. Stat. Ann. §27-234.A.

The Commissioner must calculate the royalty as a percentage of the "net value" of the minerals, that is, the value after deduction of various costs of processing, transportation, and taxes. Where these costs exceed the gross mineral value, the "net value" — and consequently the royalty — is zero. Thus, as the court below found, under §27-234.B. "it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever." Pet. at 26a.

According to the Arizona Auditor General, Arizona is the only state with a fixed, non-negotiable royalty rate for mineral leases. Pet. at 25a. In other states, royalty rates are set through competitive bidding, administrative regulation, or case-by-case negotiation. [5] Moreover, other states avoid the outright giveaway of trust minerals either by requiring minimum royalty payments or calculating royalties as a percentage of gross mineral value. [6] The state Auditor General has also found Arizona's royalty rate to be one of the lowest in the nation. If Arizona's royalty rate were comparable to other lessor states, "revenues from mineral leases would have been as much as $6.5 million more" in one year studied by the Auditor General. R 75, Exh. A.

The statutory rate is also substantially below rates charged on non-state mineral leases within Arizona itself. During the period 1973-1983, one of the petitioners in this case — ASARCO, Inc. — paid royalties to the Tohono O'Odham (formerly Papago) Indians ranging from 6% to 14% of net value for copper and molybdenum extracted from the San Xavier Reservation near Tucson. R.75, Exh. B. In no year was the royalty payment as low as 5%. During the same period, ASARCO paid the flat 5% royalty on nearly $200 million worth (net value) of the same minerals extracted from state trust land immediately adjacent to its mine on the San Xavier Reservation. *Id.* Thus ASARCO has at times paid to the Tohono O'Odhams nearly triple the roy-

[5] *See, e.g.*, Cal. Pub. Res. Code §§6895, 6897 (West Supp. 1987); N.M. Stat. Ann. §§19-8-14, -22, -33 (Supp. 1985); Okla. Stat. Ann. tit. 64, §§454, 455, 458 (West 1964); S.D. Codified Laws Ann. §§5-7-11.1, -12 (1985); Tex. Nat. Res. Code Ann. §§32.1071, -.1073 (Vernon Supp. 1988); Wyo. Stat. §36-6-101 (Supp. 1987).

[6] *See, e.g.*, Pet. at 26a; Cal. Pub. Res. Code §6895 (West Supp. 1987); Tex. Nat. Res. Code Ann. §32.1073 (Vernon Supp. 1988); Utah Code Ann. §65-1-18.

alty rate that the Land Commissioner can charge under Ariz. Rev. Stat. Ann. §27-234.B. [7]

In at least once instance, the Arizona royalty statute has forced the Land Commissioner to dispose of trust minerals for no compensation whatsoever. In November 1983, ASARCO paid no royalties whatsoever for more than $2.4 million worth of copper concentrates (gross value) produced from the state mineral lease referred to above. R.75, Exh. C. ASARCO's costs in that month exceeded the gross value of minerals produced by more than $85,000, so the "net value" was zero. *Id.* The statute therefore did not permit assessment of any royalties for that month.

The Decision Below. In the court below, petitioners challenged the mineral royalty statute as a breach of the trust restrictions in both the Enabling Act and the Arizona Constitution. [8] They maintained that the statute violated not only the specific requirements for appraisal and true value, but also the state's basic trust obligations to maximize revenues and prevent the dissipation of trust assets. The New Mexico State Land Commissioner, who administers school trust lands granted in the same Congressional act as Arizona's, filed a brief *amicus curiae* also urging invalidation of the statute, arguing that the setting of a maximum royalty rate violated basic trust principles and was inconsistent with longstanding New Mexico practice. SR 8.

In a 3 to 1 decision, the Arizona Supreme Court found that the royalty statute violated both the Enabling Act and the Arizona Constitution because it circumvented the appraisal and true value requirements, because it limited

[7] A number of federal statutes and regulations also provide higher royalty rates. *See, e.g.*, 30 U.S.C. §207 (minimum 12.5% royalty for surface-mined coal); 25 C.F.R. §211.15 (1987) (minimum 10% royalty for various minerals unless otherwise specified by Commissioner of Indian Affairs); 43 C.F.R. §3503.2-1 (1987) (no royalty limit on various BLM mineral leases).

[8] Since statehood, the Arizona Constitution has incorporated restrictions on the disposal of school trust lands that closely track those in the Enabling Act. Ariz. Const. Art. X.

returns to the trust, and because it in some cases required the giveaway of trust assets. Pet. 24a-27a. The court rejected claims by the mines that minerals were exempt from the appraisal requirement, holding that the 1951 amendment to the Act evidenced a clear Congressional intent to exempt only oil and gas leases from that requirement. The court further found that, even before the 1951 amendment, the Jones Act had subjected minerals to the trust restrictions by requiring the state to hold its mineral lands "in the same way (to 'the same effect') as its non-mineral lands." Pet. 10a. Authority granted to the legislature to determine the "manner" of mineral leasing was not a blanket exemption, the court held, but rather simply power to regulate leasing procedures and terms in a manner consistent with the trust restrictions. Overall, the court concluded that it was bound to construe the relevant statutes in favor of protecting and preserving trust purposes, and that to permit "disposal of vast mineral deposits at less than true value" would be "completely contrary to the objective sought" by the Enabling Act. Pet. 14a.

SUMMARY OF ARGUMENT

Twenty-one years ago, this Court unanimously held that the trust restrictions in the Arizona Enabling Act were designed to ensure that the beneficiaries — the schoolchildren of Arizona — would receive the "full benefit" and the "most substantial support possible" from the school land grants.[9] In sweeping terms, the Act mandates that "*all*" of the granted lands "shall be by said state held in trust" and that "disposition of *any* of said lands, or any money or thing of value directly or indirectly derived therefrom" contrary to the Act's provisions "shall be deemed a breach of trust." Act §28. In addition to placing the state in the role of trustee — a role that necessarily brought with it the duty to maximize returns and prevent dissipation of trust assets — the Act imposed the specific appraisal and true value requirements

[9] *Lassen v. Arizona*, 365 U.S. 458, 467-68 (1967).

to make doubly sure that the schools would receive the maximum possible benefit from the grants.

Despite the comprehensive trust mandates of the Enabling Act, Arizona has for years leased trust mineral lands under a statute that actually prohibits prior appraisal, sets the same maximum royalty rate for all minerals, and in some cases mandates the outright giveaway of trust mineral assets. The statute acts as a clear and significant limitation on returns from school trust lands: one major lessee has paid nearly triple the statutory royalty rate for adjacent non-state mineral leases. The record also documents that the statute has in fact forced the state to literally give away millions of dollars in trust mineral assets.

It is undisputed that Arizona's mineral leasing practices fail to comport with the Act's specific true value and appraisal requirements. In addition, as a matter of basic trust law, the royalty statute flagrantly violates the state's fiduciary duty to maximize revenue and prevent the dissipation of trust assets. It is axiomatic that a trustee may not place a limit on potential returns from trust properties, and certainly may not give away trust assets.

As the court below found, the applicable statutes and legislative history simply do not support the mines' strained notion that minerals are somehow exempt from the trust restrictions. With respect to the appraisal requirement, Congress could not have been clearer: in the 1951 amendment to the Enabling Act, Congress expressly exempted oil and gas leases — and *only* oil and gas leases — from that requirement. Prior to that time, the Act had treated oil and gas leases as a subset of mineral leases, subject to precisely the same requirements. There can be no question, therefore, that Congress knew what it was doing when it subsequently exempted oil and gas leases, but not other mineral leases, from the appraisal requirement.

In authorizing the state legislature to determine the "manner" of mineral leasing, Congress was hardly abandoning the basic trust restrictions it had so painstakingly

laid out. Courts have consistently construed such language as merely allowing states to establish leasing forms and procedures consistent with the trust, not as a license to give away trust assets. Congress used identical language in authorizing the state to determine the "manner" of grazing leases on Arizona's trust lands, and this Court in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), nonetheless found such leases to be fully subject to the appraisal and true value requirements. Nor is there any merit in the mines' claims that Congress sought to exempt mineral leases from these restrictions because such leases are somehow impossible to appraise. There is no legislative history to support such an assertion, and this Court has specifically held that mineral rights are fully appraisable just as any other asset.

Even if the 1951 amendment to the Arizona Enabling Act were not dispositive, the language and purpose of the relevant statutes show that minerals in the school sections have always been subject to the trust restrictions. Although the 1910 Enabling Act did not grant school sections known at survey to be mineral in character, Congress knew that title to sections in which minerals were subsequently discovered would remain with the state. Nevertheless, Congress did not exempt such lands and the minerals therein from the school trust restrictions, which extend to every "thing of value" taken from the trust lands.

The 1927 Jones Act confirmed the entire grant of school sections to western states, regardless of the mineral character of those sections. By directing that this grant was to be "of the same effect" as the prior grants, Congress subjected these lands to the same trust restrictions as contained in the original enabling acts. Contrary to the mines' assertions, the Jones Act was not an independent grant of minerals to the states, but rather a confirmation and extension of the existing trusts. The language of the statute itself states that the prior grants "are hereby, *extended*," and the statute's title speaks of "[c]onfirming" in the states "title to lands granted by the United States in the aid of common or public schools." Jones Act of 1927, ch. 57, 44 Stat. 1026. To make

doubly sure that the minerals would be preserved for trust purposes, Congress inserted the added restriction that the mineral lands could only be leased — not sold.

Even if the Jones Act were an independent grant of mineral lands to the state for school purposes, that grant would simply constitute an addition to the existing trust corpus, and not the establishment of an entirely new and separate trust. The Arizona Constitution confirms that there is but one trust that consists of all lands granted by the original Enabling Act "and all lands otherwise acquired by the state." Ariz. Const. art. X, §1.

The 1936 amendment to the Arizona Enabling Act extended the permissible duration of mineral leases, but did not relax any of the other trust restrictions on such leases. There is no support for the mines' assertion that the 1936 amendment was intended to fill a supposed "gap" left by the Jones Act with respect to leasing of after-discovered minerals: The amendment made no distinction between the leasing of known and after-discovered mineral lands, and in any event the Jones Act had already extended the trust restrictions to all of these school sections. Likewise, the 1951 amendment to the Arizona Enabling Act liberalized trust restrictions only with respect to oil and gas leases, retaining the restrictions with respect to all other leases, including mineral leases.

Even if mineral leases were somehow exempt from the Act's specific appraisal and true value requirements, they would still be fully subject to general trust doctrines that prohibit maximum prices and the giveaway of trust assets. The mines do not seriously dispute that these minerals are part of a trust corpus to be managed for the benefit of the common schools. Nor have the mines argued that minerals are somehow exempt from the state's basic trust duty to maximize revenues and prevent the wasting of trust assets. The fixed-rate royalty statute plainly violates these duties, and cannot be justified based on speculation that it might encourage greater mineral production over time. The Ari-

zona legislature is entitled to no special deference on this issue: to the contrary, this Court has consistently held states to the highest fiduciary standards in their management of the school land trusts.

ARGUMENT

I. ARIZONA'S MINERAL ROYALTY STATUTE VIOLATES THE ENABLING ACT AND THE ARIZONA CONSTITUTION BY PRECLUDING PRIOR APPRAISAL, BY RESTRICTING THE REVENUES THAT CAN BE DERIVED FROM SCHOOL TRUST LANDS, AND BY REQUIRING THE GIVEAWAY OF TRUST ASSSETS.

It is undisputed that Arizona's mineral royalty statute does not comport with the appraisal and true value provisions of the Enabling Act and the Arizona Constitution. [10] Those provisions unequivocally mandate that "all" school trust "lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." Under section 27-234.B of the Arizona Revised Statutes, the State Land Commissioner cannot and does not conduct prior appraisals of minerals leases, and cannot require payment of true value therefor.

[10] The Arizona Supreme Court held that the royalty statute violated *both* the Enabling Act *and* article X of the Arizona Constitution. Pet. 2a, 24a, 29a. The same court has subsequently ruled that the school trust provisions in the Arizona Constitution are even more stringent than those in the Enabling Act. *Deer Valley Unified School Dist. v. Superior Court*, 760 P.2d 537 (Ariz. 1988). Thus, the decision below rests on independent and adequate state law grounds — namely, article X of the Arizona Constitution — and this Court should accordingly dismiss the case for lack of federal jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). *See also Montana ex rel. Haire v. Rice*, 204 U.S. 291, 299-301 (1907).

In addition to the specific appraisal and true value requirements, the Act also imposes on the state the basic duties of a trustee. The Act declares that all of the granted lands and the products and proceeds therefrom "shall be by the said state held in trust," and that "[d]isposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom" for any object other than for trust purposes "shall be deemed a breach of trust." Act §28. " 'Words more clearly designed . . . to create definite and specific trusts . . . could hardly have been chosen.' " *Lassen v. Arizona*, 385 U.S. 458, 467 (1967) (citation omitted). Every court that has considered the issue has concluded that the school land grants to the western states "are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees." *County of Skamania v. State*, 102 Wash. 2d 127, 132, 685 P.2d 576, 580 (1984). [11]

Among other things, the state's fiduciary duty precludes it from setting limits on the revenues that can be derived from trust lands. The state must manage the granted lands so as to ensure that the beneficiaries enjoy the "full benefit" and "most substantial support possible" therefrom. *Lassen*, 385

[11] *See also Papasan v. Allain*, 478 U.S. 265, 270 (1986); *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970); *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 248-49, 47 N.W. 2d 520, 522-23 (1951); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 236 (Okla. 1982).

U.S. at 468. [12] Accordingly, statutes that limit the state's ability to derive maximum revenues from the trust have uniformly been invalidated. *See, e.g., State Land Dept. v. Tucson Rock and Sand Co.*, 107 Ariz. 74, 481 P.2d 867 (1971) (statutory limit of $.05 per cubic yard on royalty for sand and gravel extracted from trust lands held a breach of trust); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982) (statutes setting maximum rents for trust lands and maximum interest rates on loans from school trust fund held to illegally "interfere with the duty of the State as Trustee to maximize the return to the trust estate"). [13]

Under these basic trust principles, there can be no question that Arizona's mineral royalty statute imposes an invalid limitation on returns from school trust lands. The

[12] Numerous courts have declared that, under the school land trusts, states have the fiduciary duty to derive maximum benefit from any disposition of trust lands. *E.g., State v. University of Alaska*, 624 P.2d 807, 817 (Alaska 1981) (implied intent of grant in trust "was to maximize the economic return from the land for the benefit of the university"); *Anderson v. Board of Educ. Lands and Funds*, 198 Neb. 793, 795, 256 N.W.2d 318, 320-21 (Neb. 1977) (trustee of state lands has a "duty" to "obtain the maximum return to the trust estate from the trust properties under its control"); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 236 (Okla. 1982) (statutes governing trust lands may not "interfere with the duty of the State as Trustee to maximize the return to the trust estate"); *County of Skamania v. State*, 102 Wash. 2d 127, 136, 138, 685 P.2d 576, 580-83 (1984) (state must obtain "full value" and "best possible price" when disposing of trust assets).

[13] *See also State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981) (appropriation of trust lands for use as public park unlawfully restricted ability of state to maximize economic return therefrom); *Department of State Lands v. Pettibone*, 702 P.2d 948, 954, 956 (Mont. 1985) (any law infringing on state's management prerogatives so as to devalue trust lands held impermissible); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) (statute arbitrarily fixing valuation of school lands without regard to fair market value is void as breach of trust); *Fox v. Kneip*, 260 N.W.2d 371, 374 (S.D. 1977), *cert. denied*, 436 U.S. 918 (1978) (statutory formula for calculating rental rates for trust grazing leases cannot constitutionally impose maximum limit on rentals).

statute sets an arbitrary and absolute cap of 5% on the royalties that can be charged for trust minerals, a rate that cannot be varied based on the location of the mineral deposit or the specific materials involved. The limitation is all the more significant because the royalty is the only income that the state realizes from disposition of the minerals. No private trustee could, in good faith, tie its hands in the way the State of Arizona has with respect to the sale of school trust minerals.

Accordingly, the royalty statute is, on its face, a breach of trust. *See Murphy v. State*, 65 Ariz. 338, 353, 181 P.2d 336 (1947) ("every act of the legislature that in any manner circumvents the plain provisions of the Enabling Act is ... void"). In addition, the record conclusively demonstrates that the 5% statutory limit is in fact a very significant restriction on trust returns. The court below found it to be undisputed that Arizona has one of the lowest royalty rates in the nation. Pet. 25a. According to the Arizona Auditor General, the state could have earned millions of dollars more in mineral revenues had its royalty rate been comparable to that in other states in just one year studied. The 5% limit is substantially below the presumptive minimum of 10% for minerals extracted from Indian lands and the statutory minimum of 12.5% for surface mined coal. 25 C.F.R. §211.15 (1987); 30 U.S.C. §207. Royalties *as high as 14%* have been charged on Indian mineral leaseholds directly adjacent to state school trust leaseholds on which the state has been strictly limited to a 5% return.

Finally, the royalty statute flatly violates the state's trust duty to prevent the loss of trust assets. *See* Restatement (Second) of Trusts §§176, 181 (1959); G. Bogert, Trusts §§99, 101 (6th Ed. 1987). Because the statute calculates royalties as a percentage of net value — that is, the value after deduction of production costs — it in some cases requires the state to literally give away trust minerals (where, for example, production costs exceed the sales price). This was graphically illustrated in November 1983 when one mining company paid *no royalties whatsoever* for millions of dollars

worth of minerals taken from a school trust leasehold. Of course, it is axiomatic that the state as trustee "cannot give away trust property." *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985).

The mines assert that the fixed-rate royalty statute can somehow be justified as encouraging mineral production and thereby increasing trust income over the long haul. [14] But this Court expressly rejected such a speculative approach to the valuation of school trust lands in *Lassen v. Arizona*, 385 U.S. 458, 468-69 (1967). There it was argued that the state highway department's acquisition of school trust lands for highway purposes would have an overall beneficial affect on the value of the remaining school trust lands, and that the price to be paid by the highway department should be offset by the amount of this enhanced value as established by expert testimony. The Court squarely rejected the argument, holding that any prediction of future enhanced value, "resting as it largely would upon the forecasts of experts which by nature are subject to the imponderables and hazards of the future," would "fall[s] short of assuring accomplishment of the basic intendment of Congress" in establishing the trust. *Id.* at 468-69. *See also Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-303 (1976) (at the time of any disposition of trust land, trust must receive the "then full value of the particular interest which is being dispensed"). Likewise, the state as trustee may not give away trust mineral assets or dispose of them at below market value based on mere speculation that this will somehow result in greater long-term revenue. [15]

In any event, the court below correctly found that higher royalty rates did not necessarily discourage exploration and production. Pet. 25a. The data for ASARCO's mining operations in Arizona confirm this conclusion. On ASARCO's

[14] In support of this proposition, the mines have relied on an unpublished paper by a law student. R. 83, App. 6.

[15] *See also Ervien v. United States*, 251 U.S. 41, 47-48 (1919).

Indian leases, under which royalty rates fluctuate, production levels have actually been higher in several years when royalty rates were higher. R.75, Exh. B. Moreover in 1977 and 1983, ASARCO produced a greater net value in minerals from its Indian leases than it did from its adjoining state lease, even though it was paying the Indians a higher royalty rate in each of those years. *Id.*

II. MINERAL LEASES ON SCHOOL TRUST LANDS ARE NOT EXEMPT FROM THE ENABLING ACT'S APPRAISAL AND TRUE VALUE REQUIREMENTS.

A. The Express Exemption Of Oil And Gas Leases From Appraisal Conclusively Shows That Other Leases Are Not Exempt.

The "starting point for interpreting a statute is the language of the statute itself" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, the Court need look no further than the current terms of the Arizona Enabling Act to conclude that mineral leases are plainly not exempt from the appraisal and true value requirements. Section 28 of the Act authorizes the leasing of trust lands for grazing, agricultural, commercial, domestic, mineral and oil and gas purposes, all in a manner to be prescribed by the legislature. In the very same clause, the Act also expressly exempts oil and gas leases from "advertisement, bidding, *or appraisement.*" No such express exemption is provided for any other kinds of leases, including mineral leases. Act §28. Clearly, Congress felt that it had not waived the appraisal requirement merely by authorizing the state legislature to determine the "manner" of leasing. And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980).

The mines suggest that Congress was dealing only with oil and gas leases in the 1951 amendment, (establishing a "new regime" — Pet. Br. at 39), and that its failure to expressly exempt mineral leases from the appraisal requirement was simply an oversight. This claim ignores the fact that, in drafting the amendment, Congress considered and rejected a proposal to exempt mineral leases from even the advertisement requirement. [16] Moreover, the prior version of §28 as amended in 1936 treated oil and gas leases as a subset of mineral leases: It specifically authorized the leasing of trust lands "for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less." Act of June 5, 1936, Ch. 517, 49 Stat. 1477. In order to provide the special exemption for oil and gas leases under the 1951 amendment, Congress therefore had to *deliberately* separate the treatment of oil and gas leases from the treatment of other mineral leases: There was, in short, no accident or oversight in failing to exempt mineral leases other than oil and gas from appraisal.

The mines further urge the Court to presume that Congress in 1951 was confused and mistaken in believing that mineral leases were subject to the trust restrictions and in concluding that special exemption language was needed to waive appraisal for oil and gas leases. Pet. Br. at 40. Aside from trying to second-guess Congress, the argument is simply irrelevant: the plain fact is that Congress in 1951 evidenced an unmistakable intent that oil and gas leases should be exempt from the appraisal requirement, and that other

[16] As originally introduced in the Senate, the amendment would have expressly permitted grazing, agricultural, and mineral leases "without advertisement." S. Rep. No. 194, 82d Cong., 1st Sess. 5 (1951). The Senate committee decided to eliminate this exemption for all but oil and gas leases, in order to place Arizona "on an equal footing with the greater number of her sister states in respect to the type of leases for which provision is made." *Id.* at 2. The committee report specifically cited the leasing provisions in enabling acts from seven western states, six of which contained no express exemption from advertisement as to grazing, agricultural and mineral leases. *Id.* at 3, 5-6.

leases should not be so exempt. This most recent expression of Congressional intent controls regardless of whether it was triggered by a correct or incorrect view of pre-existing law. *Cf.* 2A N.J. Singer, Sutherland Statutory Construction §51.02 (Sands 4th Ed. 1984) (hereinafter "Sutherland"). In any event, as further set forth in Part II.D. *infra*, Congress was absolutely correct in concluding that mineral leases (including oil and gas leases) were fully subject to the trust restrictions under prior versions of the Enabling Act, and this view of prior law as evidenced in the 1951 amendment "is entitled to great weight." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Significantly, it was not only Congress that so read prior law: the 1951 amendment was sought by the State of Arizona because the *state* felt that the trust restrictions such as advertisement and appraisal *did* apply to oil and gas leases and that such restrictions were inhibiting oil and gas development. S. Rep. No. 194, 82d Cong., 1st Sess. 1, 2, 4 (1951).

The mines further seek support from a general statement in the Senate report expressing a belief that the state legislature could best determine procedures for producing income from and obtaining the maximum utilization of the granted lands. *Id.* at 2. Such a statement hardly suggests a total exemption of the state from trust restrictions: rather, it simply indicates that the state can establish leasing methods consistent with the trust. *See* Part II.B. *infra*. In any event, the context in which the above-referenced statement appears show. that the committee was referring only to the state's authority to set procedures for oil and gas leases, as these were the only leases for which procedures were being liberalized.

The mines truly distort the legislative history in making the incredible assertion that Congress actually intended to "liberalize" restrictions on mineral leasing by refusing to exempt such leases from the advertisement requirement. Pet. Br. at 40-41. The mines strain to support this view by first citing the committee's stated purpose in removing the advertisment exemption — namely, to place Arizona on an equal

footing with other states as to this provision — and by then citing a completely unrelated statement elsewhere in the report that sister states had been able progressively to liberalize the terms of leases. From the context of the report, it is manifest that the liberalization being referred to by the committee was in the permissible *duration* of oil and gas leases — not in terms governing advertisement of other leases. The report specifically cited provisions of enabling acts for seven other western states, none of which restricted the term of oil and gas leases. S. Rep. No. 194, *supra* at 2-3. In all but one of these states, however, the advertisement requirement applied to all dispositions of trust lands, and mineral leases were not exempted from that requirement. *See id* at 5-6. [17] Thus, to place Arizona on an "equal footing" with those states with respect to the advertisement requirement, Congress determined that no exemption from that requirement should be allowed in the Arizona Enabling Act. *Id* at 2.

- The mines cite a reference in the Senate report to an "exemption" under the 1936 Amendment for agricultural and grazing leases as evidence that leases were to be exempt from all trust restrictions. Pet. Br. at 41, citing S. Rep. 194, *supra* at 2. The "exemption" referred to in the report was not an exemption from the Act's appraisal and true value requirements: Rather, it was the exemption provided for agricultural and grazing (and mineral) leases from the Act's prohibition on mortgages and other encumbrances. The third paragraph of §28 of the Act provides that "[n]o mortgage or other incumbrance" of trust lands shall be allowed. As this Court has explained in the context of grazing leases, however:

[17] The relevant Enabling Act provisions are as follows: Idaho Admission Bill, ch. 656, §5, 26 Stat. 215 (1890); New Mexico Const. art. XXIV (ratified by Congress by Act of Feb. 8, 1928); North Dakota, South Dakota, Montana and Washington Enabling Act, ch. 180 §11, 25 Stat. 676, (1889); Wyoming Admission Act, ch. 664 §5, 26 Stat. 222, (1890).

> §28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." These provisions thus plainly contemplate the possibility of a lease of trust land and, in so doing, intimate that such a lease is not a prohibited "mortgage or other encumbrance."

Alamo Land & Cattle Co. v. Arizona, 424 U.S. at 306 (citations omitted). Thus, this Court has specifically recognized that the Act's leasing provisions are exemptions from the prohibition on encumbrances, but not from the appraisal and true value requirements. The 1951 amendment to the Act simply extended this exception to homesite and commercial leases — leases that had not been expressly recognized as permissible under the prior version of the Act. There was not, and never has been any intent by Congress to exempt all of these leases from the appraisal and true value requirements.

B. Congress Did Not Intend To Exempt Mineral Leases From The Appraisal And True Value Requirements When It Authorized The State To Determine The "Manner" Of Leasing.

The mines' entire exemption argument rests on the proposition that by allowing leasing "as the legislature may direct" or "in such manner" as the legislature may provide, Congress intended to obliterate the Act's specific trust restrictions with respect to minerals. Of course, the 1951 amendment to the Enabling Act completely refutes this view: If the grant of legislative authority in that Act to determine the "manner" of oil and gas leasing were sufficient by itself to waive the trust restrictions, Congress would not have bothered to go on to add an express exemption of such leases from the trust restrictions. Moreover, as the court below held, the language authorizing leasing "ought not to be interpreted so broadly as to destroy the entire objective of the statutory scheme." Pet. 14a. The school land grants must be strictly construed in favor of protecting and preserving trust purposes. *See United States v. New Mexico,*

536 F.2d 1324, 1326-27 (10th Cir. 1976). If given the broad construction urged by the mines, the "such manner" language would allow state legislatures to literally give away trust assets as long as they did so via the formality of a lease.

For these reasons, the sensible and consistent construction of the language authorizing the legislature to determine the "manner" of leasing, is as stated by the court below: namely, as giving the legislature only the power to set leasing procedures not in conflict with the express terms of the Enabling Act. Pet. 15a. Such a reading was followed by this Court when it applied the appraisal and true value requirements to grazing leases in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976). As with mineral leases, the 1951 amendment to the Enabling Act permitted grazing leases "in such manner as the Legislature of the State of Arizona may prescribe." The Court nevertheless found that the Act's appraisal and true value requirements applied to such leases:

> The New Mexico-Arizona Enabling Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by §28. . . . Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void . . .

424 U.S. at 304-05. The Court went on to hold:

> §28 . . . authorize[s] specifically a lease of trust lands for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value."

424 U.S. at 306.

The mines try to distinguish *Alamo* by asserting that the case did not involve a mineral lease, but that difference is immaterial: both mineral leases and grazing leases are authorized "in such manner as the Legislature . . . may prescribe," and that language hardly has a different meaning with respect to the former than with respect to the latter. Likewise, the mere fact that this Court in *Alamo* did not dwell on

the "in such manner" language hardly undermines the Court's explicit holding that leases were subject to appraisal. Rather, as the Solicitor General had noted, this "simply emphasizes that a natural reading of §28 does not suggest that by that phrase Congress intended to free the state from the specific restrictions of the Enabling Act." [18] Other courts that have considered the issue have uniformly reached the same result. [19]

The broad reading of the "in such manner" language urged by the mines would literally eviscerate the school land trusts throughout the West. As in Arizona, the enabling acts and constitutions for many western states authorize the state legislatures to determine the manner of mineral leasing. Although the precise terminology varies, the general pattern is to allow leasing "as the legislature may direct" or "under such rules and regulations" as the legislature may

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[18] Brief for the United States as Amicus Curiae, September 1988 at 13-14 (On Petition for Writ of Certiorari in the instant case).

[19] *Trustees for Alaska v. State*, 736 P.2d 324, 338 n.29 (Alaska 1987), *cert. denied, sub nom*, 108 S. Ct. 2013 (1988) (language in statehood act authorizing mineral leasing "as the state legislature may direct" does not give the state discretion to charge no rent or royalties); *State Land Dept. v. Tucson Rock & Sand*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970) (the phrase "such manner as the legislature may direct" does not permit disposal free from §28 restrictions, but merely gives the legislature authority to regulate the manner in which the lease is made and to set lease terms not in conflict with §28), *vacated on other grounds*, 107 Ariz. 74, 481 P.2d 867 (1971); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 254, 47 N.W.2d 520, 525 (1951) (legislative power to provide for method of leasing school lands is subject to law governing the administration of trusts); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 237 (Okla. 1982) (legislative power to set rules for leasing trust property cannot be used to set maximum prices for trust assets).

prescribe. [20] These provisions govern not only mineral leases, but also virtually every other type of lease that states might offer, including grazing, agricultural, and commercial leases. If legislative authority to determine the "manner" of these leases means that they are free of specific trust restrictions in the respective enabling acts, then the states will be able to accomplish by lease the very thing that Congress sought to prevent in establishing the trust restrictions: namely, the dissipation of trust assets at far below market value. Plainly, the unbridled legislative authority urged by the mines is wholly incompatible with the purpose of the school land trusts.

C. The Enabling Act's Mineral Leasing Provisions Were Not In Any Way Motivated By A Perceived Difficulty In Appraising Mineral Leases.

The only explanation offered by the mines as to why Congress would exempt minerals from trust restrictions is that mineral leases are supposedly impossible to appraise. There is not one shred of evidence in the legislative history to suggest that Congress was in any way motivated by such a consideration in allowing the legislature to provide for the "manner" of mineral leasing. Indeed, Congress used precisely the same language to authorize ten-year grazing, domestic, agricultural and commercial leases. The mines make no claim that these sorts of leases are also impossible to appraise.

In any event, the notion that mineral leases somehow evade appraisal is wholly without merit. Long before adoption of the Enabling Act, this Court ruled that mineral

[20] *See, e.g.*, Alaska Statehood Act, Pub. L. No. 85-508, §6(i), 72 Stat. 339 (1958); Colo. Const. art. IX, §10; Hawaii Admission Act, Pub. L. No. 86-3, §5, 73 Stat. 4 (1959); Idaho Admission Bill, ch. 656 §5, 26 Stat. 215 (1890); North Dakota, South Dakota, Montana and Washington Admission Act, ch. 180 §11, 25 Stat. 676 (1889); Oklahoma Enabling Act, ch. 3335 §§9 & 10, 34 Stat. 267 (1906); Utah Const. art. XX, §1; Wyoming Act of Admission, ch. 664 §5, 26 Stat. 222 (1890).

claims were appraisable, just as any other property interest. In *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), a condemnation case, the Court held that the value of a mining claim could be established by the testimony of witnesses familiar with the area, even though the presence of minerals had not been proven. The mere fact that the value of the claim was speculative did not preclude a credible appraisement:

> That this mining claim, which may be called "only a prospect," had a value fairly denominated a market value, may ... be affirmed from the fact that such "prospects" are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, *uncertain and speculative as it is, such "prospect" has a market value;* and the absence of certainty is not a matter of which the [condemnor] can take advantage, when it seeks to enforce a sale.

Id. at 352-53 (emphasis added). Subsequent decisions have consistently followed this rationale in holding that mineral interests are fully appraisable. [21]

Contrary to the mines' assertions, an appraisal for mineral leasing purposes does not have to await exploration and development. The true value of a property interest is akin to its fair market value; that is, the price that a willing buyer would be willing to pay a willing seller. *See* Black's Law Dictionary 537 (5th Ed. 1979). Even if information about the mineral deposit is limited, the State Land Commissioner can at a minimum survey the market to determine what royalty rates are generally being charged on comparable leases both within Arizona and in other states. It is not essential that

[21] *E.g., United States v. 179.26 Acres of Land*, 644 F.2d 367, 372 (10th Cir. 1981); *United States v. Silver Queen Mining Co.*, 285 F.2d 506, 510 (10th Cir. 1960); *Phillips v. United States*, 243 F.2d 1, 5-6 (9th Cir. 1957); *Cal-Bay Corp. v. United States*, 169 F.2d 15 (9th Cir.), *cert. denied*, 335 U.S. 859 (1948).

the Commissioner know in advance precisely the nature and extent of the mineral deposit: rather, he simply needs to determine what a willing lessee would, under all the circumstances, being willing to pay. *See* Rocky Mountain Mineral Law Foundation, 4 American Law of Mining §27.10 (1982).

The only language the mines can cite referencing the supposed difficulty of mineral appraisal is a one sentence statement by Interior Secretary Fall in 1921 hearings on a bill that never passed and that bore little resemblance to the 1927 Jones Act or subsequent amendments to the Arizona Enabling Act. [22] Such a statement is obviously entitled to no weight whatsoever in determining Congressional motives: ordinarily, even the *contemporaneous* remarks of a *legislator* who sponsors a bill are not controlling in analyzing legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). Equally unsupportive is the mines' reliance on language in a Senate report merely indicating that the mineral *character* of land is sometimes not determined until exploration work has been carried out. Pet. Br. at 31, *citing* S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926). The cited portion of the report says nothing whatsoever about mineral leasing or the supposed difficulty of appraisals in connection therewith.

D. Minerals In School Trust Lands Have Always Been Subject To The Appraisal And True Value Requirements.

Even if the 1951 amendments to the Arizona Enabling Act were not so dispositive of the issue, the history of the school land trust plainly shows that Congress always intended that minerals would be fully subject to the appraisal and true value requirements. The trust restrictions were the "most important" provisions of the Enabling Act, [23] and there is no evidence that Congress had any desire or

[22] *See* Pet. Br. at 31.

[23] *See Lassen v. Arizona*, 385 U.S. at 468.

plan to abandon those carefully crafted safeguards with respect to trust mineral assets.

1. *Minerals that passed to the state under the 1910 Enabling Act were fully subject to trust restrictions.*

Contrary to the mines' assertions (Pet. Br. 23-26), reservation of known mineral lands from the 1910 grant did not act to exempt all minerals in all school sections from the trust restrictions. At the time of the 1910 Act, Congress knew that some school sections with minerals would still be included in the trust grant because they were not then known to be mineral in character. [24] Congress did not, however, in any way exempt such lands or the minerals therein from the trust restrictions. Instead, it broadly included in the trust "all lands" conveyed by the Act and "the natural products and money proceeds" thereof. The word "lands" as used in the Enabling Act has long been held to include any minerals therein. *Campbell v. Flying V Cattle Co.*, 25 Ariz. 577, 584-85, 220 P. 417, 419 (1923). Thus, except where school sections were withheld from the grant altogether because of their known mineral character, those lands *and* the minerals in them were expressly made part of the school land grant. *See Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 234 P.2d 452 (1951) (after-discovered minerals and the school sections in which they were found are part of school trust and subject to trust restrictions).

The mines seek support from the dubious opinion in *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922) where the New Mexico Supreme Court held that certain trust restrictions in

[24] The "after discovery" of minerals in school sections was a common occurrence in the land grant states. *See Title to Lands Granted by the United States in Aid of Schools: Hearings on S. 564 Before the House Comm. on Rules*, 69th Cong., 2d Sess. (1926) (hereinafter "House Hearings"). Long before 1910, this Court had ruled that after-discovered minerals and the school sections in which they were found were to be treated as having passed to the states as part of the original school grant. *Shaw v. Kellogg*, 170 U.S. 312, 332-33 (1898).

the New Mexico Enabling Act did not apply to minerals because of the mineral reservation in the original school grant. *Neel* has been squarely rejected by the supreme courts of two states, both of which found the decision to be wholly inconsistent with Congressional intent to establish comprehensive school land trusts. [25] *Neel* was given so little credence in New Mexico itself, that the state felt it necessary to request Congressional authority to expressly exempt minerals from the trust restrictions. This request was prompted by the concerns of numerous New Mexico mineral lessees who felt their leases — issued without compliance with all trust procedures — were still clouded despite *Neel*. *See* S. Rep. No. 90, 70th Cong., 1st Sess. 2 (1928).

In subsequently granting New Mexico's request and expressly authorizing mineral leases in New Mexico without advertisement or appraisal, Congress plainly evidenced a belief that such exemptions were *not* allowed under the original Enabling Act. S.J. Res. 38, 45 Stat. 58 (1928). If the *Neel* court had been correct and minerals truly were exempt under the original 1910 Act, then no additional exemption language would have been necessary. [26] The New Mexico experience shows once again that when Congress wants to waive trust restrictions, it expressly says so. Congress has *never* granted

[25] *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 264, 234 P.2d 452, 455 (1951); *State ex rel. Rausch v. Amerada Petroleum Corp.*, 78 N.D. 247, 254-55, 49 N.W.2d 14, 19 (1951).

[26] Contrary to the mines' assertions, there is absolutely nothing in the legislative history suggesting that Congress felt the *Neel* decision was a correct reading of the then-existing law. Instead the Senate Report indicated that, despite *Neel*, there was a "serious question" as to the validity of leases that had been issued without compliance with the trust restrictions. S. Rep. No. 90, 70th Cong., 1st Sess. 2 (1928).

a similar express exemption of minerals from the specific trust restrictions of the *Arizona* Enabling Act. [27]

The mines wrongly assert that Arizona's 1915 mineral royalty statute provides contemporaneous support for the exemption of mineral leases from appraisal. In reality that statute *allowed* the Land Commissioner to appraise and collect true value — unlike the current statute that prohibits him from doing so. 1915 Ariz. Sess. Laws 13, 27-28. Nor does the lack of trust enforcement action by the Attorney General in years immediately following 1910 have any significance whatsoever: Arizona's 1915 mineral royalty statute was not on its face violative of the Enabling Act, and in any event failure of the United States to enforce the Act is hardly tantamount to a clean bill of health. *Cf. Lassen*, 385 U.S. at 465-66, 469 n. 22.

Finally, the mines are simply incorrect in claiming that, at the time of the Arizona Enabling Act, Congress followed some sort of general policy against applying trust restrictions to minerals. In the 1906 Oklahoma Enabling Act, Congress expressly required competitive bidding for mineral leases, directing state officials to set an initial royalty rate for each lease and accept bonus bids on top of that. Oklahoma Enabling Act, ch. 3335 §8, 34 Stat. 267, 273 (1906). During deliberations on the Arizona Enabling Act, the Act's sponsor Senator Beveridge spoke approvingly of the Oklahoma trust restrictions, and indicated his belief that the restrictions in the Arizona Act were even more stringent:

[27] Significantly, the *Neel* decision and subsequent Enabling Act amendments have been read very narrowly in New Mexico as exempting mineral leases only from *formal* appraisal and advertisement in every case. The New Mexico Land Commissioner takes the position that he is *still* under a trust duty to determine and obtain full value for mineral leases and that the exemptions in the Act merely allow him to choose the method: *e.g.*, formal or informal appraisal or advertisement, public sale and competitive bidding. SR 8 at 7-8.

> We have thrown conditions around land grants in several states heretofore, notably in the case of Oklahoma, but not so thorough and complete as this.

45 Cong. Rec. 8227 (1910). Thus the application of trust restrictions to minerals was completely consistent with the trend then being followed by Congress.

2. *The Jones Act of 1927 confirmed applicability of the trust restrictions to all mineral and nonmineral school sections.*

If there were any doubt that the Act's trust restrictions applied to mineral lands, that doubt was conclusively resolved by the terms of the Jones Act, which expressly "extended" the original enabling acts to encompass all of the numbered school sections regardless of their "known" mineral character:

> [T]he several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, *extended* to embrace numbered school sections mineral in character ... (a) ... *[T]he grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections,* and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

44 Stat. 1026 (1927) (emphasis added). The effect of this language was unambiguous: It no longer mattered whether a school section was known to be mineral in character at the time of an original enabling act grant. The land would be included in the trust regardles of its mineral or non-mineral character, and it would be treated precisely like any other sections granted under the original enabling act.

Contrary to the mines' assertion, Congress's direction that the grant of mineral lands "shall be of the same effect" as the original grants did not refer to the "mechanics" of the vesting of title. As the text of the statute clearly shows, Congress addressed the mechanics of title vesting in a completely separate clause: "[T]he grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, *and* titles to such numbered mineral sections shall vest in the States at the time and in the manner ... recognized by existing law ..." 44 Stat. 1026 (emphasis added). The mines' reading would render the two parts of this provision redundant: the phrase before the highlighted "and" would mean precisely the same thing as the phrase appearing after it. Such a reading would violate the well-settled rule of statutory construction that each word and clause of a statute must be given effect, and that Congress will not be presumed to have included redundant or duplicative language. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The phrase "to the same effect" must be read independently and given its plain, ordinary meaning. Because "effect" means "outcome" or "result," [28] Congress plainly intended that the outcome or result of the Jones Act grant would be precisely the same as that of the original grants: namely the inclusion of the referenced sections in the school land trusts subject to all of the same provisions and restrictions. [29]

Equally unfounded is the mines' effort to characterize the Jones Act as an "independent" grant totally unconnected with the original enabling acts. By its express terms, the Jones Act *"extended"* the prior school land grants: an unmistakable statement that the 1927 Act was directly connected to the prior grants. Likewise, the title of the Act, which serves as an indication of Congressional intent, [30] speaks explicitly of *"Confirming* in States and Territories title to lands granted by the United States in the aid of common or public schools." Ch. 57, 44 Stat. 1026 (1927) (empha-

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[28] Black's Law Dictionary 461 (5th Ed. 1979).

[29] The legislative history cited by the mines does not show that subsection (a) of the Jones Act was necessarily "drafted" by Interior Secretary Work (Pet. Br. at 32-33), nor does the Secretary's failure to discuss the "same effect" language show anything at all about Congress's intended meaning.

[30] *See, e.g., FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959).

sis added). Moreover, because the Jones Act and the various enabling acts all deal with the same subject — namely, the granting of lands for the common schools — they are acts *in pari materia* which "are to be taken together, as if they were one law." *United States v. Stewart*, 311 U.S. 60, 64 (1940). *See also* 2A Sutherland §51.02 at 453 (new statute is presumed in accord with legislative policy in prior statutes on same subject). The rule requiring joint construction of statutes is particularly strong with respect to federal land grants, which are often enacted in stages to create land systems. [31]

The legislative history conclusively demonstrates that Congress intended the Jones Act as an amendment to the prior school land grants, not as a totally new and independent grant. The Senate Report described the bill as "relinquish[ing]" to the states title to the numbered mineral sections and as "remov[ing] a condition under existing school-grant legislation" that had clouded the states' titles to school sections and "defeated" the "purpose for which they were granted." S. Rep. No. 603, 69th Cong., 1st Sess. 1, 5 (1926). In so doing, the bill would "render immediately enjoyable" by the states "the benefits *intended* to be conferred by Congress in enacting the school grant legislation." *Id.* at 3 (emphasis added). Likewise, the House Report explained that the bill was necessary to remove clouds on the school section titles "which prevent to a large extent the realization of the purposes *intended by the grant itself.*" H.R. Rep. No. 1761, 69th Cong., 2d Sess. 3 (1927) (emphasis added). The report emphasized that the Jones Act dealt "only with those lands which *were* granted to the states by Congress in their enabling acts for the benefit of their common and public schools." *Id.* (emphasis added). Other statements in the House Hearings reiterated that the 1927 Act was designed to "carry out the original purpose of the grant," and to prevent the loss of the "sacred fund" that had been established for school children. House Hearings at 7, 23.

[31] *See, e.g., Johanson v. Washington*, 190 U.S. 179, 184 (1903) (in construing school land grants, court must "read all parts of them together"); *Ryan v. Carter*, 93 U.S. 78 (1876) (various laws passed from time to time regarding lands in certain territories are all *in pari materia* and to be regarded as one statute); *Pollard's Heirs' Lessee v. Kibbe*, 39 U.S. 353 (1840) (two land grants twelve years apart were *in pari materia* and should be construed together).

Even if the Jones Act could be viewed as a separate, independent grant of mineral lands to the state, those lands would still be included Arizona's school land trust. Under the Arizona Constitution the trust and its restrictions extend not only to "[a]ll lands expressly transferred" to the state under the Enabling Act, but also to *"all lands otherwise acquired* by the State." Ariz. Const. art. X, §1 (emphasis added). The provision for inclusion of "otherwise acquired" lands in the trust was based on the expectation that the federal government "would make additional grants for the identical uses and purposes specified in the Enabling Act." *Murphy v. State*, 65 Ariz. 338, 355, 181 P.2d 336, 353 (1947). Such additional lands were to be subject to the same trust restrictions as the originally granted lands. *Id;* Ariz. Const. art. X, §1. Arizona confirmed this approach by specifying in 1915 that the "permanent common school fund shall consist of the proceeds of all lands that have been *or may be granted* to this state by the United States for the support of common schools." 1915 Ariz. Sess. Laws Ch. 5 §95 (emphasis added). Thus, even before the time of the Jones Act, the law was firmly established that any additional land grants to Arizona for school purposes would be subject to precisely the same trust restrictions as provided in the original Enabling Act.

Because the Jones Act was plainly intended to enhance, rather than undermine the school trusts, its provisions prohibiting the sale of the granted mineral lands are logically read as an *added* precaution against the dissipation of trust assets — not the only protection, as asserted by the mines. Basic rules of statutory construction require that the provisions of the earlier enabling acts be read together with those of the Jones Act "so that effect is given to every provision in

all of them." 2A Sutherland §51.02 at 453.[32] Moreover, a bare prohibition on the sale of mineral lands with no other dispositional restrictions whatsoever would hardly be sufficient to protect the trust: states would still be able to give away trust minerals under the facade of leases, leaving the trust with worthless empty holes in the ground after the leased deposits were exhausted. Congress plainly did not intend such a result when it granted these lands for support of the common schools.

Contrary to the mines' claim, Congress did not suddenly in 1927 decide that restrictions were no long necessary in school land grants and that states could be trusted completely in the management of school lands. If Congress were indeed so deferential, it would not have prohibited the states even from selling the mineral lands: nor would it have continued in effect the specific trust restrictions in the various enabling acts. The mines cite a few isolated, general statements in the legislative history to the effect that the states ought to be treated as sovereigns and relied upon to manage the school lands, but these statements were made in response to proposals that the Department of Interior, rather than the states, be allowed to manage mineral lands for support of the schools: they were hardly endorsements of the waiver of all trust restrictions. *See, e.g.*, S. Rep. No. 603, *supra*, at 10-11; House Hearings, *supra*, at 3-7.[33] Even more irrelevant is the mines' observation that the Jones Act legislative history says nothing about mineral appraisal or auc-

[32] *See also United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 396 (1934) (new enactments on subject covered by system of general statutes should be lifted in to existing system and given effect conformably thereto).

[33] Also unsupportive is the mines' incorrect, out of context paraphrasing of Congressman Morrow (not an author of the bill) as having suggested that, under the Jones Act, state leasing procedures would be the "complete safeguard" of the trust lands. Pet. Br. at 30. In reality, Mr. Morrow indicated that some states would *"fail"* to adequately protect their school lands *unless* they enacted legislation "as a complete safeguard for the trust." 68 Cong. Rec. 1820 (1927).

tion: Congress had no need to address these matters, because they were already covered in the existing enabling acts. The purpose of the Jones Act was simply to bring all mineral lands within the respective school lands trust — not to change the dispositional restrictions in those trusts.

The mines assert that it would have been somehow irrational for Congress, through the Jones Act, to impose more stringent trust restrictions on Arizona than on earlier-admitted states. But the Jones Act did not by itself impose different trust restrictions on any of the states: rather it simply brought minerals within the existing trust restrictions. To the extent the Arizona Enabling Act was more stringent than those in other states, it was because Congress in 1910 thought it should be: there was no need to re-evaluate the issue in 1927. Nor was there any reason for Congress in 1927 to turn its back on the carefully considered restrictions it imposed on Arizona only 17 years earlier.

3. *The 1936 and 1951 amendments to the Enabling Act show that Congress considered minerals to be covered by the Enabling Act's restrictions.*

In 1936, Congress changed the Enabling Act's general authorization of five year leases to specifically allow for twenty year mineral leases and ten year grazing and agricultural leases. Act of June 5, 1936, Ch. 517, 49 Stat. 1477. In expressly providing for mineral leases within the text of the Enabling Act itself, Congress plainly evidenced its belief that minerals were part of the trust corpus and subject to the very same restrictions as other trust assets. The amendment made no distinction between minerals that passed to the trust under the original Enabling Act and those that passed under the Jones Act: it simply referred to all of them as "minerals" and treated them as part of the same trust. If, as the mines claim, Congress had intended both of these classes of minerals to be completely free of trust restrictions, there would have been no reason to address mineral leases in the Act at all. Moreover, if minerals had been free of trust

restrictions from the beginning, there would have been no need to "liberalize" the permissible term for mineral leases. Clearly, Congress thought that minerals were part of the trust and subject to the original five year leasing restriction when it decided to extend the permissible term to twenty years in the 1936 amendment.

The mines assert that the Jones Act addressed only school sections known to be mineral at survey, and that the 1936 amendment was intended to fill a "gap" by addressing sections with after-discovered minerals. But neither the Jones Act nor the 1936 amendment made any distinction whatsoever in the treatment of these two classes of lands. Indeed, the whole purpose of the Jones Act was to end once and for all the differential treatment of known and after-discovered mineral lands, and to extend the original school grants "to embrace mineral *as well as non-mineral sections* of land." H.R. Rep. No. 1761, *supra*, at 2. Congress specifically wanted to spare the states from any further litigation over whether lands were or were not known to be mineral in character at the time of the original grants. *See* S. Rep. No. 603, *supra*, at 1-2. Accordingly, it directed that the grant of mineral lands be "of the same effect" as the prior grants. There was therefore no need for Congress in 1936 to fill any "gap" in the treatment of these lands: after the 1927 Act, they had all been incorporated into the various school land grants and were all subject to the respective trust restrictions.

If, as the mines assert, the Jones Act constitutes the only restriction on disposal of school sections known to be mineral at survey and the 1936 amendment governs only after-discovered sections, then the differential treatment of these lands would continue to this day. Because the Jones Act prohibits the sale of mineral rights but allows leasing for an unspecified duration, the state could presumably lease "Jones Act" mineral lands for unlimited terms, but not sell the mineral rights. Because the 1936 amendment restricts lease terms to twenty years but contains no prohibition on sale, then the "after-discovered" mineral lands could be sold outright, but leased for only twenty years. Manifestly, Con-

gress could not possibly have intended to create such a labyrinthine mineral leasing system in Arizona or any other state. The various acts are most logically and sensibly read together as producing one mineral leasing regime that is subject to the specific restrictions in the Enabling Act. [34]

Contrary to the mines' assertions, there is nothing in the language of the 1936 amendment or its history to suggest that Congress intended to liberalize anything other than the allowable duration of mineral leases. The Act did not in any way exempt such leases from the appraisal requirement, and in fact *eliminated* the pre-existing exemption of leases from the advertisement requirement. Likewise, the portion of the Senate Report cited by the mines supported the removal of trust restrictions only "to the extent proposed by the bill": it did not by any means express a general intent to abandon all restrictions. S. Rep. No. 1939, *supra*, at 3. [35] Finally, the 1936 amendment was not, as the mines speculate, an "endorsement" of a supposed "practice" by Arizona of not appraising mineral leases. There is no evidence in the record as to whether the Land Commissioner was or was not appraising mineral leases in 1936, nor does the legislative

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[34] The mines misleadingly "quote" the Senate Report as stating that neither the original Enabling Act nor the Jones Act addressed the leasing of after-discovered mineral deposits. Pet. Br. at 37, *citing* S. Rep. No. 1939, 74th Cong., 2d Sess. 2 (1936). In reality, the referenced statement came not from the committee, but from a letter reproduced in the report from the then acting Interior Secretary. Moreover, the statment was wholly gratuitous, as it was not tied to any specific provisions in the bill and was in fact totally unrelated to the bill's purpose. Accordingly, it is entitled to little weight. *See generally United States v. Clark*, 445 U.S. 23, 33 n.9 (1980); *Regan v. Wald*, 468 U.S. 222, 237 (1984).

[35] In addition to extending the permissible duration of leases, the 1936 amendment also eliminated a prohibition on the sale of trust lands for less than $3 per acre, and added a clause expressly authorizing the exchange of trust lands for other lands. Act of June 5, 1936, ch. 517, 49 Stat. 1477. References in the Senate Report to liberalization of provisions and restrictions were referring to these specific changes, along with the extension of permissible lease duration, and not to any intent to remove *other* trust restrictions.

history show that Congress was at all aware of the Commissioner's practices in this regard.

The 1951 amendment to the Arizona Enabling Act confirmed that Congress had intended all along that mineral leases be subject to the appraisal and true value requirements. There was no evidence of any concern in that statute for the two classes of mineral lands imagined by the mines. Rather, Congress treated all mineral leases as being subject to the same trust, and exempted only oil and gas leases from the appraisal and true value requirements.

4. *Other laws have provided for appraisal of mineral lands.*

The mines incorrectly imply that Congress has some sort of longstanding policy against providing for the prior appraisal of mineral interests. In 1918 — only eight years after Arizona's admission — Congress passed a statute requiring appraisal prior to sale of coal and asphalt deposits in the Choctaw and Chickasaw Indian Reservations. Act of Feb. 8, 1918, ch. 12, §4, 40 Stat. 433. The statute required the Secretary of Interior to offer the mineral rights at public auction at not less than the appraised price. *Id.* Likewise, the Federal Coal Leasing Amendments Act of 1976 requires competitive bidding for federal coal leases, with no bids to be accepted at less than "the fair market value, as determined by the Secretary." 30 U.S.C. §201. And the Department of Interior conducts what is in effect an appraisal in determining whether mineral lands selected by states in lieu of certain school sections (e.g., sections that fall within federal reservations) are similar in value to those school sections. *See Andrus v. Utah*, 446 U.S. 500, 503-504 (1980).

The 1920 Mineral Leasing Act, relied upon by the mines, does not suggest Congressional rejection of appraisals. To the contrary, the Act gives discretion to the Secretary of Interior to determine and set lease terms. *See* 30 U.S.C. §187. And even under the 1872 mining law, the Secretary must evaluate the worth of a mining claim before he can determine whether a "discovery" of valuable mineral deposits has occurred. *See, e.g., United States v. Coleman*, 390 U.S. 599 (1968). *See generally* J. Leshy, The Mining Law 158-66 (1987) (hereinafter, "Leshy").

In any event, the mines' efforts to construe the Arizona Enabling Act based on completely unrelated mining statutes are totally inappropriate. The basic purpose of the Arizona Enabling Act — to provide a trust for the benefit of the public schools — is fundamentally different from that of either the 1872 mining law or the 1920 Mineral Leasing Act, which was not primarily to generate revenue for public purposes but to promote mineral exploration and development. *See, e.g.*, Leshy at 17, 166. Given Congress' unmistakable intent that Arizona's schools should receive the "full benefit" of the school land grants, application of the appraisal and true value requirements to mineral leases makes perfect sense.

III. MINERAL LEASES ARE FULLY SUBJECT TO BASIC TRUST RESTRICTIONS THAT PROHIBIT MAXIMUM PRICES AND THE GIVEAWAY OF TRUST ASSETS.

In their zeal to escape the Enabling Act's specific appraisal and true value requirements, the mines completely ignore the other basic trust duties imposed by the Act. Even if there were no appraisal and true value requirements, the state would still be under a fiduciary duty to maximize returns from trust lands and to prevent the loss of trust assets. Arizona's mineral royalty statute unquestionably violates both of these duties, by forcing the state Land Commissioner to dispose of all trust minerals at one of the lowest royalty rates in the nation, and by forcing him in some instances to literally give away trust minerals.

The mines do not seriously dispute that minerals are part of a trust corpus, but they assert that the courts must defer to the Arizona legislature's judgment in passing the royalty statute. In the management of school trust lands, however, the Arizona legislature is entitled to no more deference than any other trustee. *See, e.g., County of Skamania v. State,*

102 Wash. 2d 127, 132, 685 P.2d 576, 580 (1984). In fact, an even *more* demanding standard of review is applied with respect to the school land trusts, which must be strictly construed to protect the trust purposes. *See Ervien v. United States*, 251 U.S. 41, 47 (1919) (trust terms of Enabling Act "preclude any license of construction or liberties of inference"). [36] This is not an area, as the mines seek to imply, of traditional federal court deference to the states such as is observed in construing grant conditions imposed by Congress under the spending power. Pet. Br. at 16, *citing Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 25 (1981). The school land grants were made pursuant to Congress' constitutional power under Article IV §3 to provide for the admission of states and the disposition of federal property, a power that this Court has described as being "without limitations." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952). The rule of construction with respect to federal land grants is unambiguous: such grants are to be "construed strictly in favor of the public," and nothing passes except what is granted in clear and explicit terms. *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892).

Judicial willingness to rigorously enforce the school land trusts is dramatically illustrated by the numerous court decisions in which state actions have been invalidated for illegally limiting returns to the school trust funds. [37] Significantly, most of these decisions were made under constitutions and enabling acts that do not contain the specific appraisal and true value requirements that appear in the Arizona Enabling Act. The courts in these cases plainly decided that, *under basic principles of trust law*, the school land trust prohibited states from limiting potential returns from

[36] *See also United States v. New Mexico*, 536 F.2d 1324, 1327 (10th Cir. 1976) (school land grant must be given "narrow interpretation"); *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 263, 234 P.21d 452, 454 (1951) (Enabling Act to be construed "strictly").

[37] *See* cases cited in notes 12 and 13, *supra*.

trust lands. Thus, above and beyond the appraisal and true value requirements, Arizona's mineral royalty statute constitutes a flagrant breach of trust.

CONCLUSION

For the reasons stated above, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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